



ATTORNEY GENERAL OF TEXAS  
G R E G   A B B O T T

February 23, 2004

Ms. Mia Settle-Vinson  
Assistant City Attorney  
City of Houston  
P. O. Box 1562  
Houston, Texas 77251-1562

OR2004-1319

Dear Ms. Settle-Vinson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 196523.

The City of Houston (the "city") received a request for "Exhibit 3 to your correspondence of November 26, 2003 to Attorney General Abbott regarding submission of additional information to the Attorney General in connection with" a previous request made by the requestor to the city for certain information.<sup>1</sup> You claim that the requested information is excepted from disclosure pursuant to section 552.107(1) of the Government Code. We have considered the exception you claim and have reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that person may submit comments stating why information should or should not be released).

Section 552.107(1) of the Government Code protects information that is encompassed by the attorney-client privilege. *See* Gov't Code § 552.107(1). When asserting the attorney-client privilege, a governmental body maintains the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *See id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity

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<sup>1</sup> We note that in his previous request to the city the requestor asked for "information in an account voucher, or contract relating to the top twenty debtors to the Houston Public Library (the "library")."

other than that of providing or facilitating professional legal services to the client governmental body. *See In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element.

Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *see id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *See id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

We note that in connection with the previous request, we asked in a letter dated November 21, 2003 that the city provide us with additional information explaining the methodology utilized by the library to determine how library patrons become debtors to the library and how the library maintains a record of amounts owed by such debtors to the library. *See* Gov't Code § 552.303(c), (d). You state that the information at issue was prepared by the library in response to a request from an Assistant City Attorney for the city's Legal Department (the "department") "solely for the purpose of assisting the [department] in representing [the library] and the [c]ity" with regard to our request. You further state that the submitted information was intended to be a confidential attorney-client communication and was only prepared and forwarded to us in the furtherance of the department's rendition of professional legal services to the library and city. Thus, you contend that the information at issue constitutes a privileged and confidential attorney-client communication that may be withheld pursuant to section 552.107(1).

Based on our review of your representations and the submitted information, we agree that the submitted information was encompassed by the attorney-client privilege. However, as the submitted information was disclosed to us by the city in response to our request under section 552.303 of the Government Code, we must determine whether the attorney-client

privilege has been waived in the instance. See *In re Monsanto Co.*, 998 S.W.2d 917, 930 (Tex. App. - Waco 1999, orig. proceeding) (finding that disclosure of information to third party waives attorney-client privilege); *Jordan v. Court of Appeals for Fourth Supreme Judicial Dist.*, 701 S.W.2d 644, 649 (Tex. 1985) (finding that when communication is disclosed to third party, party asserting attorney-client privilege maintains burden of demonstrating that no waiver occurred); Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege under section 552.107(1)), 522 at 4 (1989) (discretionary exceptions in general). We note that rule 511 of the Texas Rules of Evidence provides that

[a] person upon whom these rules confer a privilege against disclosure waives the privilege if:

- (1) the person or a predecessor of the person while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged; or
- (2) the person or a representative of the person calls a person to whom privileged communications have been made to testify as to the person's character or character trait insofar as such communications are relevant to such character or character trait.

Tex. R. Evid. 511. However, rule 512 of the Texas Rules of Evidence provides that “[a] claim of privilege is not defeated by a disclosure which was (1) compelled erroneously or (2) made without opportunity to claim the privilege.” Tex. R. Evid. 512. Thus, if our office had the authority to compel the city to provide us with the information at issue in the present request or if the city had provided the information at issue to this office without an opportunity to claim that the information was protected from disclosure under the attorney-client privilege, then the city would not have waived the attorney-client privilege when it provided the information at issue to this office. See *id*; cf. *Riverside Hosp., v. Garza*, 894 S.W.2d 850, 857 (Tex. App. - Corpus Christi 1995, orig. proceeding) (finding that under rule 512 of Texas Rules of Evidence hospital did not waive discovery privilege in disclosing privileged information in prior case pursuant to court order).

Pursuant to section 552.303 of the Government Code, if the Office of the Attorney General (the “attorney general”) determines that information in addition to that required to be submitted by a governmental body under section 552.301 is necessary in order to render a decision, the attorney general is required to give written notice of that fact to a governmental body and a requestor. See Gov’t Code § 552.303(c). Further, section 552.303(d) provides that a government body that is notified under subsection (c) shall submit the necessary additional information to the attorney general not later than the seventh calendar day after

the date that the notice is received. *See id.* § 552.303(d). If a governmental body does not comply with subsection (d) of section 552.303, the information that is the subject of a person's request to the governmental body is presumed to be subject to required public disclosure and must be released, unless there exists a compelling reason to withhold the information. *See id.* § 552.301(e).

After careful consideration of section 552.303 of the Government Code, we are unable to conclude that the city was compelled to provide this exact document that is now at issue in the present request and for which the city claims the attorney-client privilege. We note in this regard that our November 21, 2003 request to the city did not require that the city provide us with, or otherwise specifically seek, the specific information at issue or any other information that is encompassed by the attorney-client privilege. Furthermore, we also find that the circumstances surrounding this matter do not support a claim that the city was compelled erroneously to provide us with this particular information in response to our request. Additionally, we note that the city had an opportunity to claim that the submitted information was protected from disclosure under the attorney-client privilege when it submitted the information to us in response to our request under section 552.303 of the Government Code. *See Tex. R. Evid.* 512(2). Although you, in general terms, asked that we keep the submitted information confidential when you responded to our request under section 552.303, you did not at that time claim that the information was protected from disclosure under the attorney-client privilege. *See generally Tex. R. Civ. P.* 193.3 (stating how party may preserve privilege from written discovery). Accordingly, after careful consideration of your arguments and our review of the submitted information, we conclude that the city waived any interest that it may have had in the submitted information under section 552.107(1) of the Government Code when you voluntarily disclosed the information to us and, thus, no portion of it may be withheld on that basis. *See generally Tex. R. Evid.* 511(1). Consequently, the city must release the entirety of the submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

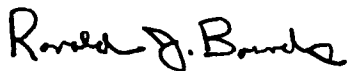
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/lmt

Ref: ID# 196523

Enc. Submitted document

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